No. 82-960

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CITY DISPOSAL SYSTEMS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether the Board properly concluded that an individual employee's honest and reasonable assertion of a right that is provided for in a collective bargaining agreement is concerted activity within the meaning of Section 7 of the National Labor Relations Act, 29 U.S.C. 157.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 683 F.2d 1005. The decision and order of the National Labor Relations Board (Pet. App. 7a-22a) are reported at 256 N.L.R.B. 451.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6a) was entered on July 22, 1982. On October 12, 1982, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including November 19, 1982, and on November 9, 1982, she further extended the time to and including December 19, 1982. The petition for a writ of certiorari was filed on December 9, 1982, and granted on March 28, 1983 (J.A. 69). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), provides in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] * * *.

STATEMENT

1. Respondent hauls garbage for the City of Detroit using tractor-trailers that take the garbage from respondent's Detroit facility, where the City initially dumps it, to a landfill in Belleville, Michigan, about 37 miles away (Pet. App. 10a-11a; J.A. 15, 38-39).[1] Respondent employs numerous drivers who operate the trucks. The general policy is to assign each driver to a particular truck, unless that truck is in need of repair (Pet. App. 2a, 11a; J.A. 14, 40).

Respondent is party to a collective bargaining agreement with Local Union No. 247, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the Union") covering its drivers (Pet. App. 9a; J.A. 4, 61-65). Section 1 of Article XXI of the Agreement provides (J.A. 64):

> . The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with the safety appliances prescribed by law. It shall not be a violation of this Agreement where

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[1] References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

> employees refuse to operate such equipment unless such refusal is unjustified.

In addition, Section 4 of the Agreement provides (*id.* at 65):

> The Employer shall not ask or require any employee to take out equipment that has been reported by any other employee as being in an unsafe operating condition until same has been approved as being safe by the mechanical department.

James Brown, one of respondent's employees, who was subject to the collective agreement, had been employed by respondent as a truck driver since November 3, 1975 (Pet. App. 10a-11a; J.A. 4). Brown's routine assignment was to operate a tractor-trailer unit designated truck No. 245. On Saturday, May 12, 1979, as Brown was preparing to dump a load of refuse at the landfill, he noticed that Frank Hamilton, another driver for respondent, was having difficulty stopping his truck, which was designated No. 244 (Pet. App. 11a; J.A. 4, 5). After Hamilton finally stopped, Brown asked what the trouble was. Hamilton exclaimed, "Look, Brown, I almost hit you" and then explained, "I don't got a sign of brakes," especially when "pulling up" on the landfill (Pet. App. 11a-12a; J.A. 6, 25, 29).

Brown and Hamilton then returned to respondent's Detroit facility, where Hamilton spoke with mechanic Francis Castelono about truck No. 244's brake problem. Castelono and mechanic David Ammerman told Hamilton that they would fix it over the weekend or perhaps on Monday morning (Pet. App. 12a; J.A. 26).

Early in the morning on Monday, May 14, while transporting a load of refuse, Brown experienced difficulty with one of the wheels on truck No. 245 and returned it for repair. He reported the problem to mechanic Ammerman. Ammerman told Brown that he would be unable to fix the truck that day because of the backlog of trucks in need of repair and advised Brown

to go home or see his supervisor about using another truck (Pet. App. 12a; J.A. 8-9). Brown then reported to his supervisor, Otto Jasmund, who, after checking out Brown's report about truck No. 245, advised Brown that he should punch out and go home (Pet. App. 13a; J.A. 10, 19-20).

Before Brown left the premises, however, Jasmund asked him to remain and drive truck No. 244 (Pet. App. 13a; J.A. 11-20). Brown declined, explaining that "there's something wrong with that truck" (*ibid.*). Brown further explained that "something was wrong with the brakes * * * there was a grease seal or something leaking causing it to be [a]ffecting the brakes" (Pet. App. 13a; J.A. 12, 20). Jasmund angrily told Brown to go home, and this remark led to an argument between them (*ibid.*).

Supervisor Robert Madary intervened and asked Brown to drive truck No. 244. Brown again refused, explaining to Madary that the truck "has got problems and I don't want to drive it" (Pet. App. 13a; J.A. 12, 20). Madary replied that "half [the trucks around here] 'have problems'" and that if respondent tried to deal with all of them it would be unable to do business (Pet. App. 13a-14a; J.A. 12). During the conversation, Brown asked, "Bob, what you going to do, put the garbage ahead of the safety of the men?" (Pet. App. 14a; J.A. 12). Madary did not reply, nor did he or Jasmund make any attempt to show Brown that the truck was safe (Pet. App. 20a; J.A. 12, 50). Instead, they allowed Brown to go home (Pet. App. 15a; J.A. 12, 50). Later that day, Brown was discharged (Pet. App. 15a; J.A. 13).[2]

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[2] John Calandra, the Union's recording secretary, received notice that same day that respondent had discharged Brown and he then notified Brown. That afternoon Calandra and Brown went to respondent's facility, where they met with supervisors

On May 15, the day after his discharge, Brown filed a written grievance, asserting that he had been improperly ordered to drive truck No. 244 (Pet. App. 15a). Citing Article XXI, Section 4 of the collective bargaining agreement, Brown stated that "Truck #244 was reported by the regular driver as being defect[ive] * * * and had not been repaired" (J.A. 65, 66). The Union declined to pursue Brown's grievance beyond the first step of the grievance procedure (Pet. App. 15a).

2. On September 7, 1979, Brown filed an unfair labor practice charge with the National Labor Relations Board (Pet. App. 15a). Upholding the decision of the administrative law judge ("ALJ"), the Board concluded that respondent violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging Brown (Pet. App. 7a).

The ALJ found that Brown had not voluntarily quit his job, as respondent had contended, but rather, that he was discharged for refusing to operate truck No. 244 (Pet. App. 17a). The judge further held that Brown's refusal was protected by Section 7 of the Act, 29 U.S.C. 157. The judge quoted from an earlier Board decision, *Roadway Express, Inc.*, 217 NLRB 278, 279 (1975), in which the Board had addressed the question whether an employee, acting alone in his assertion of a contractual right, can be said to be engaged in "concerted" activity within the meaning of Section 7:

> [W]hen an employee makes complaints concerning safety matters which are embodied in a contract, he is acting not only in his own interest, but is attempting to enforce such contract provisions in the

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Jasmund and Madary. The supervisors refused to reinstate Brown (Pet. App. 14a-15a; J.A. 13-14, 31-32).

Respondent's disciplinary form stated that Brown had "violated the following company rule * * *. Disobeying of orders (Refused to drive #244)," and added that Brown had "voluntar[ily] quit" (J.A. 67).

> interest of all the employees covered under that contract. Such activity we have found to be concerted and protected under the Act, and the discharge of an individual for engaging in such activity to be in violation of Section 8(a)(1).

Applying this reasoning to Brown's situation, the ALJ concluded (Pet. Ap. 17a, 18a-19a) that Brown's refusal came within Section 7 because Brown, on the basis of a reasonable and honest belief that the brakes on truck No. 244 were inadequate, had made a good faith assertion of the contractual right to refuse to drive unsafe equipment.[3] Respondent's discharge of Brown for asserting that right accordingly violated Section 8(a)(1) of the Act.

In adopting the judge's decision, the Board noted that in *ARO, Inc.* v. *NLRB*, 596 F.2d 713 (1979), a similar case, the United States Court of Appeals for the Sixth Circuit had declined to enforce the Board's order because it did not consider the employee's protest "concerted" activity within the meaning of Section 7. The Board nonetheless adhered to its position that conduct such as Brown's, which is supported by a collective bargaining agreement, is "concerted" activity, even though the employee acts alone (Pet. App. 7a n.3). The Board ordered Brown reinstated with back pay.

3. The court of appeals denied enforcement of the Board's order (Pet. App. 1a-5a). The court did not disturb the Board's findings that respondent discharged Brown because he had declined to drive a truck he asserted was unsafe or that Brown's refusal to drive the

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[3] The judge found it immaterial that "another driver subsequently drove truck 244 without incident or that Respondent's record[s] show that truck 244 may have been in good repair * * *" (Pet. App. 19a). "Operation of the Board's policy as set forth in *Roadway Express* is not dependent on the merits of the asserted contract claim" but only on whether "the claimed belief [is] 'honestly held'" (Pet. App. 18a-19a).

truck constituted a reasonable, good faith assertion of a right secured for Brown and all his fellow unit employees in the collective bargaining agreement.[4] The court rejected the Board's order solely because it concluded that Brown's refusal was not "concerted" activity within the meaning of Section 7 (Pet. App. 4a). Adhering to its previous decision in *ARO, Inc.* v. *NLRB*, *supra*, the court held:

> For an individual claim or complaint to amount to concerted action under the Act it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action and have some arguable basis in the collective bargaining agreement.

(Pet. App. 4a, quoting from *ARO, Inc.* v. *NLRB*, *supra*, 596 F.2d at 718). Applying that test, the court of appeals found that Brown's action in refusing to drive truck No. 244 was not concerted because "[t]here is no evidence in the record that Brown acted or asserted an interest on behalf of anyone other than himself. Brown did not attempt to warn other employees not to drive the truck he believed to be unsafe * * *. Likewise, Brown did not go to his union representative in an effort to avoid driving the truck he considered unsafe" (Pet. App. 4a).[5]

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[4] In the court of appeals—as before the Board—respondent raised two issues: (1) whether a single employee's invocation of a collectively bargained contractual right, when he is motivated by his own personal advantage, amounts to "concerted" activity, and (2) whether Brown's refusal to drive the truck was based upon an honestly held and reasonable belief that the truck was dangerous (Respondent's Ct. App. Br. 9-20). The court of appeals based its decision entirely on its view that no "concerted activities" were involved and found it unnecessary to address "other arguments raised by the Company" (Pet. App. 5a).

[5] The court acknowledged that Brown did make a comment to his supervisor regarding the safety of all of respondent's driv-

SUMMARY OF ARGUMENT

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, confers upon every employee the right to "engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." For more than 20 years the National Labor Relations Board has held that the right extends to each individual employee who protests against an employer's action which the employee honestly and reasonably believes is inconsistent with the terms of a collective bargaining agreement. See *Bunney Bros. Construction Co.*, 139 N.L.R.B. 1516 (1962). In adopting this interpretation, the Board has relied expressly upon two justifications: a complaint based on a collective agreement constitutes an extension of the collective action that led to the creation of the bargaining agreement; and the assertion of the contractual right is inherently of mutual interest to all employees in the unit since their rights under the contract are implicated by such claims. Compare *id.* at 1519 with *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, 1298 (1966), enforced, 388 F.2d 495 (2d Cir. 1967).

A. The courts that have rejected the Board's *Interboro* doctrine have relied on the "plain meaning" of Section 7, in holding that an individual employee is not acting in concert with his fellow employees when he engages in a personal, contract-based dispute with an employer. See, *e.g.*, *NLRB* v. *Northern Metal Co.*, 440 F.2d 881 (3d Cir. 1971). But Section 7 is not limited to protecting employees acting in concert; rather, by its terms, it extends to any employee engaged in "concerted activities," a phrase that has uniformly been understood as protecting at least some conduct undertaken

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ers, but held that this single, isolated statement had not been expressly relied upon by the Board, and, in any event, was not "substantial evidence" of concertedness (Pet. App. 4a).

by individual employees. See, *e.g.*, *Aro, Inc.* v. *NLRB*, *supra*, 596 F.2d at 717; Note, *Individual Rights for Organized and Unorganized Employees Under the National Labor Relations Act*, 58 Tex. L. Rev. 991, 998 (1980). Accordingly, the Board's view that the nexus between an individual's contract-based complaint and the collective interests of all the employees is sufficient to convert the individual action into concerted activity is fully consistent with the language of the statute. See *Illinois Ruan Transport Corp.* v. *NLRB*, 404 F.2d 274, 288-289 (8th Cir. 1968) (en banc) (Lay, J., dissenting).

The *Interboro* doctrine is not inconsistent with Congress' intent in limiting Section 7 to protecting "concerted activities." The pertinent language in the 1935 National Labor Relations Act had its origin in the Norris-LaGuardia Act, ch. 90, Section 2, 47 Stat. 70 (29 U.S.C. 102); it was included there to prevent federal courts from relying on conspiracy-based criminal laws to halt organizing efforts by employees. See *Automobile Workers, Local 232* v. *Wisconsin Employment Relations Board (Briggs & Stratton)*, 336 U.S. 245 (1949). The inclusion of "concerted activities" in Section 7 of the NLRA was intended by Congress affirmatively to expand the rights of every employee vis-a-vis his employer, and nothing in the history of the provision indicates that it was intended in any way to limit narrowly that protection, so long as individual conduct has a reasonable nexus to collective action. See Gorman & Finkin, *The Individual and the Requirement of "Concert" Under the National Labor Relations Act*, 130 U. Pa. L. Rev. 286, 338 (1981).

B. The two nexuses between the individual employee's contract claim and the collective good relied upon by the Board in the *Interboro* doctrine are based on a practical understanding of how collective bargaining agreements are implemented at the workplace; this is a matter within the Board's expertise and accordingly en-

titled to judicial deference. See, *e.g.*, *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 568 (1978); *NLRB* v. *Iron Workers*, 434 U.S. 335, 350 (1978); *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 260-262 (1975); *NLRB* v. *Servette, Inc.*, 377 U.S. 46, 55-56 (1964); *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 499 (1960). The doctrine is not based upon a "legal fiction." On the contrary, real collective effort, which the Act was passed to promote, created the disputed contract right (see *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937)) and an individual's assertion of that right gives the collective rights reality, both for the individual and for the group (*Smith* v. *Evening News Association*, 371 U.S. 195, 200 (1962). What is "fictional" is the notion that a single employee's assertion of a contract right—a right that was obtained by action of the group and that was intended to benefit each of its members—is not "concerted."

C. Unlike the Board's rule, which permits employees to assert vigorously their rights derived from the collective agreement, the decision below, requiring the Board to show that the individual's pursuit of his contract claim was motivated by more than self-interest, creates gaps in the coverage of Section 7 that Congress could not have intended (see *NLRB* v. *Servette, Inc.*, *supra*, 377 U.S. at 55-56; *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 626-628, 633 (1975)) and necessarily discourages other employees from protesting against the employer's failure to abide by his contract. Thus, if fortuitously, the employee happens to have a helper who also refuses to drive an apparently unsafe truck, both employees are protected. But if only one employee protests, then he is subject to dismissal. What is worse, even if the employee protests first but then agrees to drive the truck, he still could be discharged simply for protesting. Since the court's decision is based solely on how many em-

ployees are involved in the protest, the individual's conduct is not "concerted"; discharge is thus permissible for vocal protest, momentary hesitation in deciding whether to risk driving an unsafe truck or absolute refusal to drive.

D. By contrast, the Board's determination that conduct is "concerted activity" within the meaning of Section 7 does not end the inquiry. Even employees engaged in "concerted activity" may sometimes forfeit the protection of Section 7 because of the form their conduct takes. Thus, an employer could still discharge an employee if the protest is unduly abusive (*NLRB* v. *Ben Pekin*, 452 F.2d 205 (7th Cir. 1971)) or if a refusal to work clearly violates a no-strike clause in a collective bargaining agreement. Here, however, the Board found that employee Brown honestly and reasonably asserted a claim derived from the collective bargaining agreement when he refused to drive the truck; and the agreement expressly provided that justified refusals on safety grounds would not violate other provisions of the agreement. Accordingly, the Board was correct both as to the issue now presented to the Court—whether Brown's conduct was "concerted activity"—and in its ultimate finding that respondent violated Section 8(a)(1) of the Act by interfering with Brown's rights under Section 7 when it discharged him.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT AN INDIVIDUAL EMPLOYEE'S HONEST AND REASONABLE ASSERTION OF A RIGHT THAT IS PROVIDED FOR IN A COLLECTIVE BARGAINING AGREEMENT IS CONCERTED ACTIVITY WITHIN THE MEANING OF SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT

The basic rights guaranteed to each employee by the National Labor Relations Act are set out in Section 7 of the Act, 29 U.S.C. 157, which provides in pertinent part (emphasis added):

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other *concerted activities for the purpose of collective bargaining or other mutual aid or protection* * * *.

Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]."

The pivotal language of Section 7 at issue in this case is the phrase "concerted activities"; specifically, the question is to what extent and in what circumstances an employee acting alone has engaged in concerted action. The Board has held since at least 1962 that an employee who asserts claims based on a collective bargaining agreement is engaged in concerted activity because "in asserting such a claim, [the employee] sought to implement the collective bargaining agreement" and "the implementation of such an agreement by an employee is but an extension of the concerted activity giving rise to that agreement." *Bunney Bros. Construction Co.*, 139 N.L.R.B. 1516, 1519 (1962). In *Bunney Bros.*, the employee submitted a claim for a half day's pay when rain forced the employer to shut down after only two hours of work, that was the pay arrangement expressly provided for in the collective bargaining agreement. Nevertheless, the employer discharged the employee. The Board held that this was a violation of Section 8(a)(1) of the Act.

The case from which the general doctrine linking the individual assertion of collective bargaining rights with Section 7 protection derives its name, *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, 1298 (1966), enforced, 388 F.2d 495 (2d Cir. 1967), was, in part, an application of the rule already adopted in *Bunney Bros.* The Board did, however, supply an additional, albeit

related, justification for the rule that a contractually-based protest is covered under Section 7. *Interboro* concerned the discharge of John and William Landers, two brothers who had complained to their employer about working conditions and terms of payment that did not meet requirements set by the collective bargaining agreement. The Trial Examiner dismissed the unfair labor practice complaint because he concluded that the protests were effectively made by John alone and that he complained not for "legitimate union or concerted objectives" but rather "for his own personal selfish benefit and aggrandizement" (157 N.L.R.B. at 1311). The Board did not agree that John was alone in speaking out to the employer, finding, instead, that John's brother and another man, Collins, had also been "involved in the complaints" (*id.* at 1298). The Board, however, explained further (*ibid.*; footnote omitted, emphasis added):

> [E]ven if the complaints were made by John alone, they still constituted protected activity since they were made in the attempt to enforce the provisions of the existing collective bargaining agreement. [We have] held that complaints made for such purposes are *grievances within the framework of the contract that affect the rights of all the employees in the unit*, and thus constitute concerted activity which is protected by Section 7 of the Act.

Accord: *T & T Industries, Inc.*, 235 N.L.R.B. 517, 520 (1978); *Roadway Express, Inc.*, 217 N.L.R.B. 278 (1975), enforced, 532 F.2d 751 (4th Cir. 1976); *John Sexton & Co.*, 217 N.L.R.B. 80 (1975); *Chas. Ind. Co.*, 203 N.L.R.B. 476 (1973); *H.C. Smith Construction Co.*, 174 N.L.R.B. 1173, 1174 (1969). Thus, the Board's *Interboro* doctrine is predicated on these two theories: the assertion of a right in a collective bargaining agreement is an extension of the concerted activity that gave rise to the agreement in the first place and the claim based on the contract necessarily affects the rights and

interests of all the other employees in the bargaining unit.

A number of courts of appeals have upheld applications of the *Interboro* doctrine.[6] Indeed, the Eighth Circuit regarded it as "obvious that rights secured by [a collective bargaining] agreement, though personal to each employee, are protected rights under Section 7 of the Act because the collective bargaining agreement is the result of concerted activities by the employees for their mutual aid and protection." *NLRB* v. *Selwyn Shoe Manufacturing Corp.*, 428 F.2d 217, 221 (1970). See also *Illinois Ruan Transport Corp.* v. *NLRB*, 404 F.2d 274, 289-289 (8th Cir. 1968) (Lay, J., dissenting). On the other hand, several courts of appeals have rejected the Board's interpretation of Section 7.[7] Those

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[6] *NLRB* v. *Ben Pekin Corp.*, 452 F.2d 205, 206 (7th Cir. 1971); *NLRB* v. *Selwyn Shoe Manufacturing Corp.*, 428 F.2d 217, 221 (8th Cir. 1970); *NLRB* v. *Interboro Contractors, Inc.*, 388 F.2d 495, 500 (2d Cir. 1967). See also *NLRB* v. *Town & Country LP Gas Service Co.*, 687 F.2d 187, 191-192 (7th Cir. 1982); *Ontario Knife Co.* v. *NLRB*, 637 F.2d 840, 845 (2d Cir. 1980) (dictum); *NLRB* v. *John Langenbacher Co.*, 398 F.2d 459, 463 (2d Cir. 1968), cert. denied, 393 U.S. 1049 (1969).

[7] The court below relied on its own prior decision in *Aro, Inc.* v. *NLRB*, 596 F.2d 713, 718 (6th Cir. 1979), in which it held (emphasis added):

> For an individual claim or complaint to amount to concerted action under the Act it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action *and* have some arguable basis in the collective bargaining agreement.

Several other circuits have expressed a similar view. See, *e.g.*, *Royal Development Co.* v. *NLRB*, 703 F.2d 363 (9th Cir. 1983); *NLRB* v. *Northern Metal Co.*, 440 F.2d 881, 884 (3d Cir. 1971); *NLRB* v. *Buddies Supermarkets, Inc.*, 481 F.2d 714, 719 (5th Cir. 1973) (dictum). But see *Anchortank, Inc.* v. *NLRB*, 618 F.2d 1153, 1161 n.10 (5th Cir. 1980), in which the Fifth Circuit suggested that the Board's theory was supported by this

courts require not only that the claim be based on the collective bargaining agreement but also that it be asserted with some indication that the employee contemplates group action.

What distinguishes the courts of appeals that have rejected the construction of "concerted activities" embodied in the *Interboro* doctrine from those that have accepted it is both a failure to accord adequate deference to the views of the Board, the agency charged with administering the Act, and a failure to appreciate either the importance of a collective bargaining agreement for individual employees or the ways in which a collective bargaining agreement is translated from mere paper promises into a reality in the workplace.

A. The Board's *Interboro* doctrine is fully consistent with the language of Section 7 of the National Labor Relations Act and is not inconsistent with the intention of Congress in limiting the scope of the statute to "concerted activities"

1. This Court has clearly held that the task of defining the scope of Section 7 "is for the Board to perform in the first instance as it considers the wide variety of cases before it" (*Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 568 (1978)), and in general that any "defensible construction" the Board adopts is entitled to "considerable deference" (*NLRB* v. *Iron Workers*, 434 U.S. 335, 350 (1978)). Courts that have rejected the Board's *Interboro* doctrine have done so, at least in part, because they have concluded that the language of Section 7 does not permit the Board's interpretation.[8]

Court's decision in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

[8] The Third Circuit in *NLRB* v. *Northern Metal Co.*, *supra*, 440 F.2d at 884, cited a dictionary definition describing "concerted" in terms of mutual planning or agreement and asserted that that circuit's own gloss on the term, reading it as including

It is clear, however, that the Board's *Interboro* doctrine does not fly in the face of language that compels a contrary conclusion. Section 7, after all, speaks of "concerted activities"—not "employees acting in concert"—so the provision cannot be said to be plainly limited to actions taken by two or more employees acting in tandem. Indeed, no court of appeals has held that Section 7 excludes conduct solely because it was engaged in by a single employee. See *Aro, Inc.* v. *NLRB*, 596 F.2d 713, 717 (6th Cir. 1979). As one commentator has pointed out, "[The circuit courts] are uniform * * * in extending the 'concerted activities' clause to include activity by an individual who is in fact acting on behalf, or as representative, of other employees." Note, *Individual Rights for Organized and Unorganized Employees Under the National Labor Relations Act*, 58 Tex. L. Rev. 991, 998 (1980). Moreover, the Board's interpretation comports with the express limitation in the statute to "concerted activities"; the Board has acknowledged that not all individual employee protests come within the ambit of Section 7.[9] Nevertheless, it

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not only group action, but also "'talk looking toward group action'" (quoting *Mushroom Transportation Co.* v. *NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)) "stretched" its meaning. Nevertheless, it concluded (440 F.2d at 884) that the *Mushroom Transportation* gloss was reasonable, while the *Interboro* doctrine represented an unacceptable expansion of the plain meaning of the statute.

[9] The Board thus does not regard instances of mere "personal griping," when there is no collective agreement or other basis for mutual concern (see note 13, *infra*), as "concerted activities" within the meaning of Section 7. See, *e.g.*, *Capitol Ornamental Concrete Specialities, Inc.*, 248 N.L.R.B. 851 (1980); *Tabernacle Community Hospital & Health Center*, 233 N.L.R.B. 1425, 1428-1429 (1977); *Snap-On Tools Corp.*, 207 N.L.R.B. 238, 239 (1973); *Northeastern Dye Works, Inc.*, 203 N.L.R.B. 1222, 1223 (1973); *Continental Manufacturing Corp.*, 155 N.L.R.B. 255, 257-258 (1965); *Ryder Tank Lines, Inc.*, 135 N.L.R.B. 936, 938 (1962).

properly recognizes that a single employee's reasonable, good faith assertion of a right secured in a collective bargaining agreement necessarily involves or affects collective interests, which are the interests Section 7 on its face is designed to protect.

2. There is thus no proper basis for rejecting the Board's *Interboro* doctrine on any plain meaning theory. Of course, the phrase "concerted activities" is susceptible to either a broad or narrow reading, and if the legislative history indicated that Congress intended to limit the coverage of Section 7 to activities engaged in by—or expressly on behalf of—two or more employees, then naturally that intention should be honored. In fact, however, the legislative history reveals no such intent, and, if anything, suggests the contrary.

As this court and a number of commentators have observed, the significance of the phrase "concerted activities" is to be found in the history of the labor movement prior to the enactment in 1935 of the National Labor Relations Act. *Automobile Workers, Local 232* v. *Wisconsin Employment Relations Board (Briggs & Stratton)*, 336 U.S. 245, 257-258 (1949); Gorman & Finkin, *supra*, 130 U. Pa. L. Rev. at 331-338; Note, *supra*, 58 Tex.L. Rev. at 1006-1008; Note, *The Requirement of "Concerted" Action Under the NLRA*, 53 Colum. L. Rev. 514, 515-516 (1953). "The most effective legal weapon against the struggling labor union was the doctrine that concerted activities were conspiracies, and for that reason illegal." *Automobile Workers, Local 232* v. *Wisconsin Employment Relations Board*, *supra*, 336 U.S. at 257. In response to the frequent use of this weapon by federal courts hostile to the labor movement, Congress first enacted an exemption for certain types of peaceful labor union activities—"whether singly or in concert"—from the sanctions of the antitrust laws (Sections 6 and 20 of the Clayton Act, 15 U.S.C. 17, 29 U.S.C. 52). In 1932, af-

ter the Clayton Act exemption had proved inadequate, Congress enacted the Norris-LaGuardia Act restricting federal court jurisdiction with respect to labor injunctions and declaring in Section 2 of that Act (47 Stat. 70), 29 U.S.C. 102, the statement of national policy, that "the individual * * * worker" should be free from, among other things, "the interference, restraint, or coercion of employers of labor, or their agents, in the designation of [bargaining] representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Substantially that same language was then included in Section 7(a) of the National Industrial Recovery Act, ch. 90, 48 Stat. 198, and in its successor, Section 7 of the National Labor Relations Act. See *Eastex, Inc.* v. *NLRB*, *supra*, 437 U.S. at 565 n.14. As Professors Gorman and Finkin have explained (130 U. Pa. L. Rev. at 338; emphasis in original):

> [O]ne of the objectives of the NLRA was to take the same forms of conduct which the Clayton and Norris-LaGuardia Acts had declared protected against government sanction and declare them as well to be protected against private sanction through employer coercion and discipline. All of this legislation, to be sure, was focused principally upon the protection of group action for the purpose of improving wages and working conditions. But there is not the slightest hint in the history of the NLRA that in attempting to *expand* the protection that the law would give to *group* activity to secure benefits or improvements, Congress contemplated a *less* favored status for *individual* activity having the same objective.

In sum, protection of "concerted activities" in Section 7 of the NLRA was intended by Congress affirmatively to expand the rights of every employee vis-a-vis his employer, and nothing in the history of the provision indi-

cates that it was intended in any way to limit that protection so long as the employee's conduct has a reasonable nexus to collective action. There is, then, no basis in either the language or the legislative history of Section 7 for rejecting the Board's *Interboro* doctrine.

B. The Board's *Interboro* doctrine is reasonable because it is based on a practical understanding of both the relationship between the collective bargaining agreement and the individual employee and the effect that a single employee's contract claim necessarily has on the interests of all other employees in the bargaining unit

1. In the absence of controlling statutory language or legislative intent, the touchstone for deciding whether the Board's interpretation of Section 7 should be upheld is whether it reasonably serves the basic purposes of the Act in general and Section 7 specifically. See *NLRB* v. *Servette, Inc.*, 377 U.S. 46, 55-56 (1964). In this regard, the *Interboro* doctrine accurately embodies the view, on which the Act is premised, that individual employees should have available to them the rights obtained in a collective bargaining agreement. In the National Labor Relations Act, Congress undertook to respond to the plight of the employee forced to rely solely on his own strength in dealing with his employer concerning the terms of his employment. As this Court explained in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937), citing *American Steel Foundaries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921):

> [A] single employee was helpless in dealing with an employer; * * * he was dependent ordinarily on his daily wage for the maintenance of himself and family; * * * if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; * * * union was essential to

> give laborers opportunity to deal on an equality with their employer.

In Section 7 of the Act, Congress extended protection to employees' efforts to join together and, through their selected representative, negotiate collective bargaining agreements with their employers.

No one questions that an individual employee is engaged in concerted activity when he files an individual grievance pursuant to the contract mechanism that collective bargaining has achieved, see, *e.g.*, *NLRB* v. *Ford Motor Co.*, 683 F.2d 156 (6th Cir. 1982); *Crown Central Petroleum Corp.* v. *NLRB*, 430 F.2d 724, 729 (5th Cir. 1970), and there is no reason why the employee's action should not similarly be regarded as concerted when he directly makes a claim that derives its force from that same collective process.

Collective agreements make it unnecessary for employees to stand alone before their employers; employees are no longer forced to assert only their own view that they are entitled to some particular right or benefit. Even an employee who is hired after such an agreement is executed is "entitled by virtue of the National Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms." *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 336 (1944). Indeed, even if an employee, on his own, negotiates an individual contract with the employer, it is not "effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement [; for t]he very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect their strength and bargaining power and serve the welfare of the group." *Id.* at 338.

The *Interboro* doctrine, by protecting those employees who attempt individually to assert their bargained

for rights, helps give those rights meaning. Thus, contrary to the suggestion of some courts that the Board's *Interboro* doctrine is based upon a mere "legal fiction" involving "constructive concerted activity" (*NLRB* v. *Northern Metal Co.*, 440 F.2d 881, 884 (3d Cir. 1971)), real collective effort was required to obtain collective contract rights, and the individual assertion of collective rights gives those rights reality. Indeed, if there is anything artificial or fictional, it is the theory that a single employee's assertion of a collective right—a right that was obtained by action of the group—is not "concerted" unless there is either further group action or a clear design to precipitate further group action.

2. The related rationale for the *Interboro* doctrine, also derived from the Act, is the notion that an employee who speaks up concerning an employer's action that may violate the collective agreement is acting in the interest of all, whether he is acting out of conscious altruism or merely out of a desire to preserve his own immediate stake in the controversy. Ultimately, of course, most of the employees' interests in the agreement are "selfish" in the sense that each employee is concerned primarily, although perhaps not always exclusively, with the effect of the agreement on his own employment situation. But as this Court has noted in another context (*Smith* v. *Evening News Association*, 371 U.S. 195, 200 (1962)):

> The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts. Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree inevitably intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based.

See also *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975, quoting *Mobil Oil Corp.* v. *NLRB*, 482 F.2d 842 (7th Cir. 1973)) (action of an employee seeking assistance of a union representative "at a confrontation with his employer" comes within the Section 7 protection for "'concerted activities for the purpose of * * * mutual aid and protection' * * * even though the employee alone may have an immediate stake in the outcome * * *.").

It makes no difference how "selfish" the employee's subjective intent may be; the fact remains that his vigilance in attempting to see that the employer respects rights that the employee reasonably assumes he enjoys under the collective agreement is likely to work to the benefit of all. That "concerted effect" should be sufficient to bring the employee's action within the ambit of Section 7. *Anchortank, Inc.* v. *NLRB*, 618 F.2d 1153, 1160-1161 (5th Cir. 1980) (dictum). But see *Roadway Express, Inc.* v. *NLRB*, 700 F.2d 687, 693-694 (11th Cir. 1983) (suggesting that the Fifth Circuit had rejected the *Interboro* doctrine in *NLRB* v. *Buddies Supermarkets, Inc.*, 481 F.2d 714 (5th Cir. 1973)).[10]

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[10] The result need not be any different simply because union stewards or other officers may be specifically assigned the task of monitoring an agreement. Similar efforts by rank-and-file employees are obviously important since they frequently may be the only ones on the spot to protest apparent contractual violations.

Nor does the *Interboro* doctrine interfere with a union's status as the employees' exclusive representative for collective bargaining under Section 9(a) of the Act, 29 U.S.C. 159(a). See *NLRB* v. *R.C. Can Co.*, 328 F.2d 974, 978-979 (5th Cir. 1964). The doctrine does not require an employer to entertain grievances inconsistent with the collective bargaining agreement, but simply recognizes individual employees' rights to present greivances based on the agreement. See *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 61 n.12 (1975).

3. The Board's *Interboro* doctrine thus involves a practical recognition that, regardless of what the individual employee says or thinks about his fellow workers in making a contract-based protest, his fate will necessarily affect his co-workers. Indeed, if the employee loses his job or is otherwise penalized for protesting an employer's apparent failure to abide by his contract, the very reason for having a collective bargaining agreement is directly undermined and the willingness of other employees to assert good faith protests based on the contract will be severely lessened. The Act is designed to preclude an employer from being able to deter these forms of collective action, and the Board's interpretation of Section 7 to protect the individual protestant directly furthers those goals.

Moreover, the Board's application of *Interboro* has been tailored carefully to further the express policies that support it. Thus, under *Interboro*, Section 7 applies only when the employee's actions are based on an honest and reasonable belief that the claim is supported by a provision in the collective bargaining agreement. Although the Board does not demand that the claim ultimately prove to be meritorious or that the employee refer expressly to the bargaining agreement in

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Judge Lay, in dissent in *Illinois Ruan Transport Corp.* v. *NLRB*, 404 F.2d 274, 281-288 & n.3 (8th Cir. 1968), suggested that Section 9(a)'s proviso, which guarantees employees "the right at any time to present grievances to their employer," is, an independent source of the rights recognized in the *Interboro* doctrine. See generally Dolin, *The Interboro Doctrine and the Courts: A History of Judicial Pronouncements on the Protected Status of Individual Assertions of Collective Rights*, 31 Am. U.L. Rev. 551, 562-564 (1982); Note, *Individual Rights for Organized and Unorganized Employees Under the National Labor Relations Act*, 58 Tex. L. Rev. 991, 1003-1005 (1980). The Board, however, has made clear that the rights in *Interboro* cases are rooted solely in Section 7 of the Act. See *Colonial Stores, Inc.*, 248 N.L.R.B. 1187, 1188 n.7 (1980).

asserting his claim,[11] the Board does require that the claim be made in good faith and come within the scope of the agreement.[12] Obviously, other employees will not likely benefit if an individual's claim is frivolous or has no apparent connection with the collective bargaining agreement;[13] but pursuit of a substantial claim does benefit other employees and certainly derives its justification from the collective agreement.

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[11] See, *e.g.*, *Michigan Screw Products*, 242 N.L.R.B. 811, 814 (1979); *Youngstown Sheet & Tube Co.*, 235 N.L.R.B. 572, 576 (1978); *John Sexton & Co.*, 217 N.L.R.B. 80 (1975).

[12] See, *e.g.*, *National Wax Co.*, 251 N.L.R.B. 1064-1065 (1980) (employee's wage claim based on promise allegedly made to him personally, not based on collective bargaining agreement); *Snap-On Tools, Corp.*, 207 N.L.R.B. 238-239 (1973) (probationary employee's seniority claim had no basis in the contract).

While the good faith requirement is sometimes expressed in terms suggesting a subjective standard (see, *e.g.*, *United Parcel Service*, 241 N.L.R.B. 1074, 1077 (1979), enforcement denied, 629 F.2d 173 (D.C. Cir. 1980), cert. denied, 450 U.S. 931 (1981); *Roadway Express, Inc.*, 257 N.L.R.B. 1197, 1203 (1981), enforcement denied, 700 F.2d 687 (11th Cir. 1983), petition for cert. pending, No. 82-2061), the standard as *applied* in most Board cases is essentially an objective one. As the Administrative Law Judge in *Youngstown Sheet & Tube Co.*, 235 N.L.R.B. 572 (1978), observed (*id.* at 576), the assertion of a frivolous claim would call into question an employee's good faith; but an arguably reasonable claim—even if not ultimately meritorious—would meet the standard.

[13] In some instances when an individual complains to a government agency concerning statutory violations or protests to the employer regarding other matters of common concern, employees as a whole may receive some benefit, even in the absence of a collective bargaining agreement. In such cases the Board has found the complaint to be "concerted." *Diagnostic Center Hospital Corp.*, 228 N.L.R.B. 1215, 1217 (1977); *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975). The validity of this broader doctrine is not, however, at issue in this case.

This case plainly illustrates how the policies the Board seeks to further are properly applied. Under the facts found by the Board, Brown asserted a right not to drive truck No. 244 because he had reason to believe that there were problems with its brakes; and this claim is unequivocally supported by an express provision in the contract. The fact that Brown did not advert specifically to Section 1 of Article XXI of the agreement (J.A. 64) does not deprive him of this basis for his claim. An employee cannot be expected to assert his claim with the precision of a lawyer. Cf. *Love* v. *Pullman Co.*, 404 U.S. 522, 526-527 (1972).

In addition, Brown's refusal to drive the vehicle he believed was not in safe operating condition benefitted all of the employees by serving notice that the employer's apparent indifference to the relevant provision in the contract will not go unchallenged, thereby encouraged future compliance.[14] If not punished, Brown's ac-

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[14] The fact that the Union did not take to arbitration Brown's challenge to his discharge does not show his claim to have been an unreasonable one. Indeed, an employee's assertion of a complaint may not necessarily be deemed unreasonable even if it is taken to arbitration and ultimately rejected. As Judge MacKinnon stated in his concurring opinion in *Banyard* v. *NLRB*, 505 F.2d 342, 350 (D.C. Cir. 1974):

> Even though Banyard's position * * * ultimately proved erroneous, his position was not unreasonable. * * * As long as Banyard acted with a reasonable and good faith belief that his interpretation of the contract was correct, the National Labor Relations Act protects his concerted efforts to enforce that interpretation. Otherwise, employees would be discouraged from asserting interpretations favorable to themselves except in the clearest situations involving unambiguous contract language. In other words, the employee is protected when he engages in concerted activity to enforce a reasonable and good faith interpretation of the contract, even though his interpretation ultimately does not prevail.

See also *NLRB* v. *John Langenbacher Co.*, 398 F.2d 459, 462-463 (2d Cir. 1968), cert. denied, 393 U.S. 1049 (1969). The

tion will serve as an example for other employees who reasonably believe that the employer has disregarded the collective bargaining agreement. This potential benefit to all employees covered by the agreement warranted the Board's finding that Brown's assertion of his claim was "concerted" activity within the meaning of Section 7 of the Act.

C. The interpretation of Section 7 adopted by the court below unreasonably limits the employee's statutory protection in ways that Congress could not have intended

Notwithstanding the clear policy basis for the Board's *Interboro* doctrine, the court below required that in addition to the nexus between Brown's claim and the collective bargaining agreement, the Board show some independent relationship between Brown's refusal to drive truck No. 244 and potential group action. The proof required by the decision below creates anomalies that Congress could not reasonably have intended. For instance, there would be no issue concerning "concerted activities" in this case if Brown, in protesting that he should not be required to drive truck No. 244, had had a helper who also objected to taking the truck out, or if Brown had previously discussed unsafe trucks with another employee and spoken also on behalf of that individual, or if Brown's complaint had been phrased as a prelude to group action of some kind.[15] The court's decision, making Section 7 rights turn upon such fortuities as the presence of a helper or

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contract gave Brown a right to refuse to drive a truck that he was "justified" in believing was unsafe. As shown, Brown's belief that truck 244 was unsafe was both sincere and reasonable.

[15] *Aro, Inc.* v. *NLRB*, 596 F.2d 713, 716 (6th Cir. 1979), quoted in *Kohls* v. *NLRB*, 629 F.2d 173, 177 (D.C. Cir. 1980); *NLRB* v. *Northern Metal Co.*, 440 F.2d 881, 884-885 (3d Cir. 1971); *Mushroom Transportation Co.* v. *NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

the occurrence of prior discussions, serves no rational purpose, at least where it is collectively-secured rights that are being invoked. This Court has previously rejected such excessively literal readings of the National Labor Relation's Act's provisions, particularly where, as here, the basic purpose of the particular provision or the Act in general would thereby be disserved (*NLRB* v. *Servette, Inc.*, 377 U.S. 46, 55-56 (1964)) or unwarranted "loopholes" would be created in basic protections or prohibitions of the Act (*Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 626-628, 633 (1975)).

Under the court of appeals' reasoning, the Act provides absolutely no protection to an employee who claims a right reasonably within the scope of the collective bargaining agreement if he does not appear to be speaking for other employees as well as himself or preparing for group action. This is so regardless of how the employee presents his claim. Under the court's theory, the Act in no way precludes an employer from discharging an employee for making a claim, whether the employee refuses to do certain disputed work or simply politely requests that the employer consider granting some right under the collective agreement. Thus, the Sixth Circuit, in *Aro, Inc* v. *NLRB*, *supra*, 596 F.2d at 716-717, declined to enforce the Board's order with respect to an employee who had been fired merely for making complaints based on his reasonable understanding of the contract. In *Bunney Bros. Construction Co.*, *supra*, 139 N.L.R.B. at 1519, the employer discharged an employee merely for presenting a claim for compensation expressly provided for in the contract.

The court of appeals' decision thus would have allowed respondent to discharge Brown even if he had agreed to drive truck No. 244 to the dumpsite as ordered. He could have been discharged merely for stat-

ing that he thought he had the right to refuse to drive a truck with brakes that he reasonably feared were unsafe. Under the logic of the decision below, the court would find that the conduct was not "concerted" because the protest does not anticipate group action, and that would end any inquiry into the lawfulness of discharging the employee for daring to assert his rights.

D. The *Interboro* doctrine is consistent with other legal doctrines bearing on the protection afforded concerted activity

Contrary to the court of appeals' approach, under *Interboro* the Board would consider an individual employee's reasonable, contract-based claims to be "concerted," and therefore within the scope of Section 7, but a finding of "concerted" activities would not necessarily end the matter. Not all concerted activities are protected. Gorman & Finkin, 130 U. Pa. L. Rev. 286, 355-356 (1981); Note, *National Labor Relations Act Section 7: Protecting Employee Activity Through Implied Concert of Action*, 76 Nw. U.L. Rev. 813, 814-815 (1981).

Concerted activity may, for example, be carried out in so abusive a manner that the impropriety of the means outweighs the Section 7 rights of the employee. Thus, in *NLRB* v. *Ben Pekin Corp.*, 452 F.2d 205 (7th Cir. 1971), the court first noted its agreement with the Board that the employee involved was engaged in concerted activity when—concerned that he was not being paid the wages due under the collective bargaining agreement—he asked "Is there a payoff here?" (*id.* at 206); and it then concluded, under the test of *NLRB* v. *Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), that the employee's remark "was not so defamatory or opprobrious as to isolate the allegation from the related protected activity" (452 F.2d at 207). See also *Colonial Stores, Inc.*, 248 N.L.R.B. 1187, 1189 (1980) (minimal

disruption resulting from display of an informational sign in the employer's parking lot did not cause employee to forfeit Section 7 protection of her protest of employer's failure to comply with settlement of contract grievance); *Johnson Motor Lines*, 228 N.L.R.B. 393, 395-396 (1977) (rejecting, on factual grounds, claim that steward had forfeited Section 7 rights by using grievance activity as cover for work slowdown and deliberate harassment of employer).

In addition, concerted activity may be unprotected because it is in clear violation of a no-strike clause. *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 246 (1962), overruled on other grounds, 398 U.S. 235 (1970).[16] While it is not always an easy question whether particular conduct constitutes a strike within the meaning of a no-strike clause, the Board will not deem an individual's contract-based protest protected under Section 7 if it finds that the conduct violates such a clause. Compare *Sunbeam Corp.*, 184 N.L.R.B. 950, 951-952 (1970), enforced, 459 F.2d 811, 816-818 (7th Cir. 1972) (Stevens, J.) (employee engaged in conduct that was concerted, but unprotected, when he protested grievance dismissal by inviting others to strike in violation of no-strike clause) with *Colonial Stores, Inc.*, *supra*, 248 N.L.R.B. at 1189 (employee's grievance protest did not lose Section 7 protection where employee protest was on nonwork time, sign displayed

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[16] Neither of the respondent's two exceptions filed with the Board (see note 4, *supra*) included a contention that an employee's refusal to drive a truck, if based upon a reasonable, good faith assertion of the contractual right to refuse to drive unsafe equipment, would nonetheless violate the no-strike clause of the collective bargaining agreement. Respondent was therefore barred by Section 10(e) of the Act, 29 U.S.C. 160(e), from making such an argument in the court of appeals. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982). In any event, as we show hereafter, such a contention in this case would be without merit.

in employer's parking lot was solely informational, and no employees were induced to leave work).[17]

Instances of a single employee's refusal, on safety grounds, to do particular work are, however, often a special case. See Gorman & Finkin, *supra*, 130 U. Pa. L. Rev. at 354-355. In view of the fact that contractual rights respecting safety are, in many instances, of little value if the employee must perform the dangerous work first and file his grievance afterwards, unions often negotiate terms providing, in essence, that an employee's reasonable refusal to operate dangerous equipment will not constitute a violation of the contract. This was the case here (Pet. App. 11a; J.A. 64), and it is true also of many collective bargaining agreements in the transportation industry. See, *e.g.*, *McLean Trucking Co.*, 252 N.L.R.B. 728, 730 n.8 (1980), enforced, 689 F.2d 605 (6th Cir. 1982); *Roadway Express, Inc.*, 217 N.L.R.B. 278, 279 (1975), enforced, 532 F.2d 751 (4th Cir. 1976). See also *Wheeling-Pittsburgh Steel Corp.*, 241 N.L.R.B. 1214, 1221-1222 (1979), enforced, 618 F.2d 1009 (3d Cir. 1980). In such circumstances the Board is particularly warranted in holding that Section 7 protects an employee from being discharged for exercising what he reasonably believes to be his contractual right to refuse to operate the vehicle in question. Compare *Michigan Screw Products*, 242 N.L.R.B. 811, 813-814 & n.8 (1979) (finding violation for discharge of employee who declined overtime on three occasions in reasonable belief that it was voluntary under contract, but noting that, had employer explained to employee that situation was urgent and that therefore under another contractual provision, over-

[17] But see *Anco Insulations, Inc.*, 247 N.L.R.B. 612, 613 (1980) (noting single employee's picketing "without regard to the no-strike provision of the bargaining agreement" as a factor bearing on question whether conduct was concerted activity).

time could be required, case might have been in an "obey-and-grieve posture").[18]

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[18] Even in the absence of a contractual exception to a no-strike clause, a refusal to operate dangerous equipment may sometimes escape the proscription of the clause even if the conduct would otherwise be found to constitute a strike. Under 29 U.S.C. 143, which provides that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees shall not be deemed a strike under this chapter," a refusal to work—even on the part of a number of employees—will not constitute a violation of a no-strike clause where there is "'ascertainable, objective evidence supporting [the employees'] conclusion that an abnormally dangerous condition for work exists.'" *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 387 (1974). See also *Whirlpool Corp* v. *Marshall*, 445 U.S. 1, 10-11 (1980).

Congress has also recently enacted legislation prohibiting the discharge or discipline of certain categories of employees employed by commercial motor carriers for refusals to operate commercial motor vehicles under specified circumstances. Section 405(b) of the Surface Transportation Assistance Act of 1982, Pub.L. No. 97-424, 96 Stat. 2157. That Section provides in pertinent part:

> No person shall discharge, discipline, or in any manner discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer and have been unable to obtain, correction of the unsafe condition.

The present case is consistent with these principles. The Board found that respondent discharged Brown when he claimed a right to refuse to operate truck No. 244 (Pet. App. 14a-15a, 18a). As soon as Brown was thus put on notice that his claim respecting his right not to operate truck No. 244 had been finally refused by the immediate supervisors with whom he had discussed it, he went to the Detroit facility with the business agent to attempt to reach an adjustment, and, when that was unsuccessful, he filed a written grievance on a form supplied by the Union, as provided for in the collective bargaining agreement (J.A. 62). Compare *United Parcel Service, Inc.*, 232 N.L.R.B. 1114, 1115 (1977), enforced, 603 F.2d 1015 (D.C. Cir. 1979) (Member Jenkins dissenting, agreeing that unfair labor practice complaint should be dismissed, but resting conclusion on fact that employee's conduct in pursuing grievance constituted "express repudiation of specific contract terms"); *United Parcel Service, Inc.*, 205 N.L.R.B. 991 n.2 (1973), enforced, 511 F.2d 447 (D.C. Cir. 1975) (*picketing* by employees unprotected where it contravened contractual grievance procedure). Accordingly, Brown's response was completely reasonable and fully in accord with the requirements of the collective bargaining agreement. In these circumstances, protecting Brown's right to protest does not impair any substantial interest of respondent.

In sum, the court of appeals erred in declining to uphold the Board's finding that the conduct for which Brown was discharged was protected by Section 7 of the Act; and, more specifically, with respect to the precise issue presented in this case, the court erred in holding that Brown's conduct did not constitute "con-

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This special protection for employees in the commercial motor carrier industry applies regardless of whether employees enjoy any safety rights under a collective bargaining agreement.

certed" activity within the meaning of Section 7 of the Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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